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No. 82-1954

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH ABADI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court was required to submit the question of materiality to the jury in a prosecution of petitioner for making false statements in violation of 18 U.S.C. 1001.

2. Whether the evidence was sufficient to support petitioner's convictions for making false statements.

3. Whether the trial court abused its discretion in admitting evidence concerning petitioner's prescription of certain drugs for his patients.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 706 F.2d 178.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1983. The petition for a writ of certiorari was filed on June 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on 28 counts of making false statements in connection with claims submitted under the federally funded Medicaid program, in violation of 18 U.S.C. 1001. He was

sentenced to concurrent terms of five years' imprisonment on each count and was fined $20,000. The court of appeals affirmed (Pet. App. 1a-5a).

1. The evidence at trial showed that petitioner was an osteopathic physician who worked as a sole practitioner in Detroit. He often treated more than 100 patients in a single day (Tr. 280-285). Shortly after he opened his office in 1976, petitioner began treating seven individuals with real or feigned back problems and other medical complaints (Tr. 32-33, 35, 59, 68, 73, 171, 191, 203, 232, 234, 236, 243, 245, 247-248). These individuals, all Medicaid beneficiaries, visited petitioner on a weekly or biweekly basis. The principal, and in some cases sole, reason for their visits was to obtain prescriptions for drugs; petitioner freely prescribed valium, empirin, and soma for these individuals (Tr. 35-36, 40, 53, 69-70, 171-172, 174-175, 194-196, 229-230, 235, 245, 247-248, 254-255).

Petitioner examined the backs of four of the seven patients on their first or second visits to his office in 1976. Thereafter he did not examine or treat their backs in any manner (Tr. 35-36, 40, 58, 70, 73, 194-196, 207-211). At no time did he examine or treat the backs of the other three patients (Tr. 173-175, 181, 234-235, 237, 242, 247, 254).

The seven patients continued to visit petitioner's office and to receive prescriptions for drugs through and including the period of June to November 1978. Following these visits, petitioner submitted 28 Medicaid claim forms to the state Medicaid agency. On each form petitioner indicated that he had performed a spinal manipulation[1] on the patient

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[1]"Spinal manipulation" is a manual therapeutic technique for treating abnormalities in the muscular-skeletal system along the spine (Tr. 97-100). The technique is sometimes uncomfortable, takes between five minutes and an hour, and, like surgery, would normally be preceded by the patient's informed consent (Tr. 97, 106-107). A patient undergoing spinal manipulation would be aware of the procedure (Tr. 137).

(Tr. 92-93, 115, 151-153, 160-163). The state agency reimbursed petitioner for some of these claims (*e.g.*, Tr. 160-163).

2. Prior to trial petitioner moved to exclude evidence that he had prescribed controlled substances for the seven patients, citing Fed. R. Evid. 403. The trial court denied the motion. At trial, the court instructed the jury that the issue of materiality under 18 U.S.C. 1001 was a question for the court and that the statements on the Medicaid claim forms in question were material (JI Tr. 95).[2] Defense counsel objected to the instruction (*id.* at 104-105). The trial court denied petitioner's motion for a directed verdict of acquittal on the ground of insufficient evidence (Tr. 445-446).

3. The court of appeals affirmed (Pet. App. 1a-5a). Following the great weight of authority in the courts of appeals, the court held that materiality in a prosecution under 18 U.S.C. 1001 is a question of law to be decided by the court. The court rejected petitioner's claims that the district court abused its discretion in allowing petitioner's patients to testify about the drug prescriptions they obtained from petitioner and that the prosecutor had made improper statements during the closing argument, and it held that the evidence was sufficient to support the convictions.

ARGUMENT

1. Petitioner contends (Pet. 4-6) that the court of appeals erred in ruling that materiality is a question of law to be decided by the court. This Court recently denied certiorari in a case presenting the same contention. *Isenberg* v. *United States*, No. 82-967 (May 16, 1983). Review is likewise unwarranted in this case.

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[2]"JI Tr." refers to the transcript containing the jury instructions.

Petitioner recognizes (Pet. 5) that the court of appeals' ruling is consistent with the law in the majority of circuits. See, *e.g., United States* v. *Richmond,* 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *Fern,* 696 F.2d 1269, 1274 (11th Cir. 1983); *United States* v. *McIntosh,* 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Bernard,* 384 F.2d 915, 916 (2d Cir. 1967); *United States* v. *Ivey,* 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963); *United States* v. *Clancy,* 276 F.2d 617, 635 (7th Cir. 1960); *Weinstock* v. *United States,* 231 F.2d 699, 703 (D.C. Cir. 1956).[3] However, he suggests that the better rule is found in the Ninth and Tenth Circuits, which have approved the practice of submitting the question of materiality to the jury. See, *e.g., United States* v. *Irwin,* 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez,* 594 F.2d 725, 729 (9th Cir. 1979).

Petitioner has cited no case, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not

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[3]See also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977 & Supp. 1980). Moreover, this Court has recognized that the materiality of false statements generally is a question for the court. In *Sinclair* v. *United States,* 279 U.S. 263, 298 (1929), construing the pertinency requirement of a statute proscribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. * * * And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

submitted to the jury. The Ninth Circuit has held in two cases that the trial court erred in itself deciding the question of materiality rather than submitting it to the jury, but in both cases it affirmed the convictions because it was clear that the statements at issue were material. See *United States* v. *Valdez, supra,* 594 F.2d at 728-729; *United States* v. *East,* 416 F.2d 351, 354-355 (9th Cir. 1969). The Tenth Circuit has not addressed the question whether a trial court commits reversible error by deciding the question of materiality. See *United States* v. *Irwin, supra,* 654 F.2d at 677 n.8, and cases cited therein.

Petitioner does not contend that his statements on the Medicaid claim forms that he had performed spinal manipulations on his patients were not material, and indeed there can be no doubt on this point. The information on the claim forms was the sole basis on which the state agency approved and paid petitioner's Medicaid claims (Tr. 148-149). In fact, some of petitioner's fraudulent claims for the provision of spinal manipulations were approved on the basis of his false statements (Tr. 160-163). Accordingly, it is clear that these statements "had a 'natural tendency to influence, or [were] capable of affecting or influencing, a governmental function' " (*United States* v. *Diaz,* 690 F.2d 1352, 1357 (11th Cir. 1982), quoting *United States* v. *Markham,* 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977)). See, *e.g., United States* v. *Voorhees,* 593 F.2d 346, 350 (8th Cir.), cert. denied, 441 U.S. 936 (1979) (defendant who applied for and received illegal payments is not in a position to assert that his false statement was not material on the ground that it was incapable of producing illegal payments). Thus, the materiality of petitioner's statements was clearly established, and there is no reason to believe that any other court of appeals would have granted petitioner the relief he seeks. To whatever extent a conflict may exist, the present case does not provide an appropriate occasion for this Court to address it.

2. Petitioner also contends (Pet. 6-7) that the evidence was insufficient to support his convictions, because the government failed to prove the falsity of his statements that he had performed spinal manipulations. But the evidence, viewed in the light most favorable to the government (see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), demonstrates that the government did carry its burden on this issue. A number of petitioner's patients testified that he did not render any back treatment for them, contrary to the statements on the Medicaid claims (see, *e.g.*, Tr. 35-36, 40, 58, 70, 73, 173-175, 181, 194-196, 207-211, 234-235, 237, 242, 247, 254). The court of appeals properly rejected petitioner's fact-bound contention, and no further review is warranted.

3. Finally, petitioner contends (Pet. 7-8) that the trial court abused its discretion in denying his motion to exclude evidence concerning his prescription of controlled substances for his patients, citing Fed. R. Evid. 403. However, the evidence was relevant to illustrate the context in which petitioner made his false statements. As the court of appeals noted (Pet. App. 5a), the patients' testimony about receipt of the drugs "revealed a portion of the overall scheme whereby [petitioner] gave drugs to his patients and then used their medicaid cards to bill for non-existent treatment." The term "controlled substances" was not used at trial, and the jury was not told that the prescriptions may have constituted criminal offenses. The court of appeals correctly held (*ibid.*) that the trial court did not abuse its discretion in admitting the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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